

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY)

Petition for declaration of service currently)
provided under Rate 6L to 3 MW and greater)
customers as a competitive service pursuant)
to Section 16-113 of the Public Utilities Act)
and approval of related tariff amendments.)

Docket No. 02-0479

Public Version

Direct Testimony of

Maurice Brubaker

On behalf of

Illinois Industrial Energy Consumers

Project 7856
August 30, 2002



BRUBAKER & ASSOCIATES, INC.

ST. LOUIS, MO 63141-2000

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Q WHAT IS THE SUBJECT MATTER OF YOUR TESTIMONY?

A I present an overview of the position of IIEC in this proceeding. I also present our view of the importance of the various aspects of the market that should be addressed by the Illinois Commerce Commission (Commission) in reaching its decision in this case, and provide our overall recommendations to the Commission.

In addition, I offer testimony concerning the role of the Competitive Transition Charge (CTC) in the market and supplement the testimony of my colleague Jim Dauphinais with respect to the continually changing structure of the wholesale market for electricity.

Q WHAT OTHER WITNESSES ARE APPEARING ON BEHALF OF IIEC?

A My colleagues Alan Chalfant, Jim Dauphinais and Bob Stephens are also offering testimony on specific aspects of the issues before the Commission.

Mr. Chalfant primarily addresses the testimony of Drs. Landon and McDermott and demonstrates that the switching statistics employed by them are an unreliable indicator of the presence of competitive alternatives. He also addresses market concentration for electricity more broadly and, using a market power study produced by ComEd and prepared by Dr. Landon's colleague, Mr. Rodney Frame (and other data), demonstrates that the ComEd destination market is too highly concentrated to be characterized as competitive.

Mr. Dauphinais addresses additional aspects of the market concentration issue and shows that to a significant extent ComEd or its affiliates are artificially supporting alternative suppliers in its market area. In addition, he discusses the structure of wholesale markets in reference to the Federal Energy Regulatory Commission's (FERC) initiatives on Standard Market Design (SMD) as well as some

1 of the implications of ComEd's decision to join the Pennsylvania-New Jersey-
2 Maryland (PJM) Retail Transmission Organization (RTO). In so doing, he notes that
3 these changes could adversely affect competition in the ComEd service area.

4 Mr. Stephens addresses additional issues relating to the status of existing
5 Alternative Retail Electric Suppliers (ARES) in light of a recent Appellate Court
6 decision and the financial condition of certain of the ARES. He demonstrates that the
7 eligibility to serve and/or the viability of many of the existing ARES, which ComEd
8 asserts are available to supply energy on a competitive basis in its service territory,
9 are questionable. The balance of his testimony evaluates the nature of the electricity
10 service available under Rate 6L and contrasts this to products being offered by other
11 suppliers. This analysis demonstrates that competitive power supplies are not
12 reasonably available in ComEd's service territory. Finally, he addresses the
13 shortcomings of Rate HEP as an alternative for customers, and discusses some of
14 the harms to customers of ComEd's proposals.

15 **Q ARE ANY OTHER WITNESSES APPEARING AS A PART OF IIEC'S**
16 **PRESENTATION?**

17 **A** Yes. Representatives of some of the IIEC companies intervening in this case are
18 also presenting testimony. They detail some of their experiences and observations
19 with regard to the retail market, and express concerns which they, as customers,
20 have about ComEd's proposal.

1 **Perspective**

2 **Q IIEC WAS ONE OF THE PRIMARY PROPONENTS OF ALLOWING RETAIL**
3 **CUSTOMERS TO HAVE CHOICE IN THEIR SELECTION OF ELECTRICITY**
4 **SUPPLIERS. DOES IIEC CONTINUE TO SUPPORT RETAIL CHOICE?**

5 A Yes. IIEC believes that, in the long run, competitive forces will be the most efficient
6 way to deliver electricity to retail consumers. However, IIEC is extremely concerned
7 about eliminating the bundled rate option until such time as it is clear that there is in
8 place, and can be expected to continue to be in place, a genuinely competitive
9 electricity market in which to purchase resources.

10 **Q WHAT ARE SOME OF THE CONCERNS THAT EXIST AT THE PRESENT TIME**
11 **WITH RESPECT TO THE EXISTENCE OF A COMPETITIVE MARKET FOR**
12 **RETAIL ELECTRIC SUPPLIES?**

13 A First, there is a serious question about the number of independent suppliers and
14 supply sources available to serve this market. Second, the market in general is
15 undergoing significant change as a result of FERC's initiatives on SMD, as well as a
16 continuing evolution in the structure and membership of the various RTOs. Third,
17 other factors, such as the continuing presence of the CTC, are disruptive of
18 competitive market operations.

19 **Q PLEASE EXPLAIN YOUR CONCERNS WITH RESPECT TO SUPPLIERS.**

20 A A key factor in this proceeding is who are the suppliers that will offer power to the
21 affected retail customers under conditions necessary to satisfy the required
22 conditions pertaining to the availability of reasonably equivalent substitute service that
23 is reasonably available from suppliers not affiliated with ComEd, at comparable

1 prices. ComEd has not come forth with statistics which disclose the extent to which
2 the existing suppliers to retail customers in its market are receiving electricity from
3 ComEd or ComEd-affiliated entities. ComEd claims either not to have the
4 information, that it is irrelevant, or claims that if it does have the information, it's
5 confidential. (See responses to the following data requests: IIEC 7, 19, 32 and 2-2;
6 and Staff HJH 1.01-1.07.) In my opinion, it is incumbent upon ComEd to disclose
7 these critical facts in a way that participants in this proceeding who have signed
8 confidentiality agreements can have access to the data in order to analyze the supply
9 situation and provide testimony upon which this Commission can rely. ComEd has
10 repeatedly refused to supply this critical information. Even if there were no other
11 concerns, it is my opinion that the lack of information with respect to this question
12 should cause ComEd's Petition to be rejected.

13 It is clear that ComEd or its affiliate has been affirmatively supporting various
14 suppliers under special arrangements that ComEd has deemed to be confidential; but
15 the extent of this support has not been revealed.

16 **Q WHERE HAS COMED PROVIDED INFORMATION CONCERNING THESE**
17 **ARRANGEMENTS?**

18 **A** The arrangement is mentioned at Page 26 of the testimony of William McNeil and
19 Jennifer Sterling. In addition, the form of the agreement was provided in response to
20 Staff Data Request HJH 1.01-1.07. ComEd has withheld from IIEC, and other
21 parties, but apparently has allowed Staff, the opportunity to review the specific
22 agreements executed with the individual RES who are taking advantage of this
23 arrangement.

1 **Q WHAT IS THE GENERAL NATURE OF THESE ARRANGEMENTS?**

2 A The information in the box is redacted from the public version based on ComEd's assertion of confidentiality.
3



16 **Q WHAT DO YOU CONCLUDE FROM THIS?**

17 A By no stretch of the imagination can it be concluded that there is a robust competitive
18 market into which retail customers should be released when the existing market
19 requires financial support by ComEd or its affiliate. If in fact the market were
20 competitive, it obviously would not be necessary for ComEd or its affiliates to provide
21 these inducements to other suppliers. Knowing exactly what ComEd is doing, for
22 whom, and to what degree is critical. The fact that the market is being artificially
23 propped up by an interested party is very revealing. Furthermore, there is no basis to

1 conclude that the retail market will exist under today's conditions if this subsidy is
2 removed.

3 **Q HAS THE PROBLEM WITH COMPETITION IN THE MARKET BEEN RECENTLY**
4 **NOTED IN ANY PUBLIC FORUMS?**

5 A Yes. For example, in August 2002 Chairman Richard Mathias released the "Report of
6 Chairman's Summer 2002 Roundtable Discussions Re: Implementation of the
7 Electric Service customer Choice and Rate Relief Law of 1997." In a discussion
8 about the development of competition in retail markets in Illinois, the following
9 appears at Page 15 of the Report:

10 "It is interesting to note that all customer participants in the
11 2002 Roundtable agreed that after April 1, 2002
12 competition in the ComEd service territory was drastically
13 reduced. These customer participants all agreed that this
14 was a direct result of the market value calculation that was
15 announced on April 1, 2002 and its impact on the power
16 purchase option pricing and the ComEd transition charge
17 which is paid to ComEd by its customers."

18 It is obvious that there are major problems in the electricity markets.
19

20 **Q WHAT ADDITIONAL CONCERNS DO YOU HAVE WITH RESPECT TO THE**
21 **AVAILABILITY OF COMPETITIVE SUPPLIERS?**

22 A As Mr. Stephens' testimony indicates, a recent Appellate Court decision concerning
23 the criteria which must be met by alternate suppliers casts a significant degree of
24 doubt on the ability of many of the existing alternate suppliers to continue to qualify
25 under the Public Utilities Act. Thus, even the relatively few suppliers who are now in
26 the market may find their ability to continue in the market to be compromised, or even

1 precluded. Furthermore, the financial viability of at least one of the existing suppliers
2 is highly questionable.

3 Mr. Dauphinais also points out that because of changes in the wholesale
4 market that are being considered by FERC as part of its SMD initiative, it is possible
5 that even remaining suppliers, who are otherwise eligible to serve retail load in
6 ComEd's area, may be precluded from doing so unless they arrange for longer term
7 supplies that are specifically identified as available to serve retail load.

8 The extent of the problem is perhaps best revealed by Attachment PRC/DFK-
9 5 to the testimony of ComEd witnesses Paul Crumrine and Dennis Kelter, which is the
10 Mid-America Interconnected Network, Inc. (MAIN) audit of the summer 2002 load and
11 supply conditions. Most of the supply of alternate providers that is indicated as
12 available to serve retail load in the ComEd service area does not qualify for inclusion
13 as "capacity" in the MAIN audit. It shows that the capacity (over 2,100 megawatts out
14 of 2,500 megawatts, or more than 80%) that is allegedly being provided by alternate
15 suppliers is not sufficiently secure to count as rated capacity in MAIN. The FERC
16 SMD proposals, if adopted, could effectively eliminate these suppliers from the
17 market, or require them to make alternate arrangements. It is not known whether or
18 not these suppliers could make such arrangements (and if so, at what cost), and how
19 their ability to compete would be affected.

20 Mr. Dauphinais also points out that given the reciprocity conditions, import
21 limitations and uncertainty surrounding RTO membership and RTO rules and regula-
22 tions, there is additional uncertainty with respect to the ability to economically deliver
23 power to retail customers in the ComEd service territory.

1 **Q IN ADDITION TO THE ABOVE, ARE THERE OTHER ISSUES CONCERNING THE**
2 **WHOLESALE MARKET THAT ARE OF CONCERN?**

3 A Yes. As the Commission is well aware, there has been major upheaval in the whole-
4 sale electricity market, beginning with the demise of Enron and its "asset lite"
5 strategy. The distress and suspicion created by the activities of certain traders, as
6 well as the apparent over-commitment of new resources in some areas has led to
7 significantly weakened players in the wholesale market. It is difficult to pick up any
8 industry publication these days without reading about these issues, about the lack of
9 credit worthiness or about cancellations of capacity that had been planned or was in
10 the advanced development stage.

11 As to the disdain for wholesale trading, an article which appeared in the
12 August 26, 2002 edition of *POWER MARKETS WEEK* at page 5, titled "Potential
13 Investors in Trading Units are Elusive, Some Wait to See a Bottom" capsulize the
14 state of the market as follows in the lead paragraphs:

15 "Merchant firms can't find joint venture partners or
16 acquirers for their trading operation because of fears of
17 unknown trading liabilities, the contraction of the trading
18 market, worries about keeping top-notch trading talent, and
19 a reluctance among potential investors to buy into the
20 sector before they see a clear bottom.

21 Those are among the key reasons that other once
22 big merchant trader firms seeking partners or buyers are
23 finding it so difficult, according to interviews with a variety
24 of industry analysts, observers and players.

25 No fewer than five of the country's largest power
26 marketers, including four of the first quarter's top 11 whole-
27 sale sellers, are – or were – looking for a deep-pocketed
28 partner or buyer. Mirant and Calpine have been searching
29 for the elusive financial partner since early in the year,
30 Williams and Dynegy Corp. recently threw their units into
31 the pot, and other firms that have not said so publicly are
32 undoubtedly looking for investors."

1 In terms of the installation of new capacity, the following is typical of the
2 reports recently being made with respect to the cancellation of previously announced
3 capacity. In an article titled "Crossing the threshold: The new era of the unregulated
4 generation industry," authored by Cheryl Muench of Black & Veatch, which appeared
5 in the August 2002 edition of *Electric Light & Power*, it is noted that:

6 "The fundamental overbuild led to decreasing
7 pricing volatility and lower overall electricity prices into the
8 future.

9 The lower prices let to project cancellations, as pro-
10 formas no longer projected the necessary profit for the
11 companies. Between January and April of 2002, 30 GW of
12 capacity had been cancelled, with another 50 GW delayed
13 or otherwise placed on hold."

14 **Q ARE PRODUCTS COMPARABLE TO THAT OFFERED UNDER RATE 6L**
15 **AVAILABLE TO LARGE CUSTOMERS IN THE MARKET?**

16 **A** No. Mr. Stephens addresses this in some detail in his testimony. The characteristics
17 of products being offered currently are quite different from that of Rate 6L.

18 A complicating factor, in addition to those noted by Mr. Stephens, is the
19 continued presence of the CTC. The CTC has the effect of creating substantial
20 uncertainty for customers electing to purchase supplies from a non-ComEd source.
21 The amount of CTC which a customer is obligated to pay, if any, is a function of a
22 number of factors, including the Market Value Index (MVI) which is supposed to
23 measure the value of the electricity supply component. As the MVI value changes, so
24 does the CTC.

25 As an example of how the continued presence of the CTC can affect the
26 operation of the market, consider what has happened in the last two years. In early
27 2001, the MVI values calculated under the mechanism approved for ComEd

1 produced MVIs that were much higher than had historically been the case. The result
2 was that the CTCs were diminished significantly, and in fact eliminated for many
3 customers who had been subject to a CTC. A customer entering into a long-term
4 supply contract based on conditions at that time would have evaluated this option
5 based on a low, or zero, CTC. Then, early in 2002 new values for MVI were
6 established with the result that the CTCs increased dramatically, by over 2¢ per
7 kilowatthour in some cases.

8 Since the CTC changes annually, customers who had entered into long-term
9 contracts with alternate suppliers were now faced with a combination of alternate
10 power supply cost and CTC that was higher than what would have been the case
11 under PPO, or perhaps even under bundled Rate 6L. While the CTC was
12 incorporated as a transition mechanism, to soften the blow to the incumbent suppliers
13 when competition began, it certainly creates an unsettling condition for customers
14 considering alternate supply sources.

15 **Q WHAT ARE THE CONSEQUENCES OF THE CONTINUED PRESENCE OF THE**
16 **CTC?**

17 A Clearly, one of the major consequences of the presence of the CTC is that it adds an
18 additional dimension of uncertainty into the analysis that a retail customer must
19 conduct in deciding how to secure electric service. If the CTC were no longer
20 present, there would be fewer ways for a customer's decision to turn out to be
21 uneconomic as a result of the operation of factors beyond the customer's control.

22 In addition, customers on alternate supply face the risk of changes in the
23 delivery service rates. To the extent that these customers are not paying a CTC,

1 increases in delivery service charges flow directly through to them, a cost which
2 would not be faced by customers on Rate 6L.

3 **Q HAS THE PROBLEM OF THE CTC BEEN WIDELY DISCUSSED?**

4 A Yes, it certainly has. As just one example, there was extensive discussion of this
5 problem in the Summer 2002 Roundtable discussions. It was reported in the
6 previously referenced Chairman's Report on the Summer 2002 Roundtable. For
7 example, the following appears at page 22 of that report:

8 "However, the change in the market value could have a
9 significant impact for the customer that is on a fixed price,
10 multiple-year contract with a supplier. For while the price
11 of electricity may be fixed, the transition charge fluctuates
12 yearly as MVIs and the resulting transition charge are
13 recalculated. In some years the change may benefit the
14 customer while in others it may not. However, there is no
15 guarantee that over time the customer will benefit. In fact,
16 as several 2002 Roundtable participants opined, there is a
17 real risk to the customer that it may be significantly harmed
18 because the savings on the energy may be appreciably
19 less than the increases in the transition charge.
20 Additionally, customers may not want to accept the risk
21 that the transition charge payments may exceed any
22 savings."

23 Obviously, this is a problem and interferes with the development of alternate
24 supply arrangements.

25 **Q IF COMED'S PETITION WERE APPROVED, AND RATE 6L WERE NO LONGER**
26 **AVAILABLE FOR CUSTOMERS WHO ELECTED TO PURCHASE FROM AN**
27 **ALTERNATE SUPPLIER, WOULD A CUSTOMER CURRENTLY ON RATE 6L**
28 **HAVE TO TAKE THIS FACT INTO CONSIDERATION?**

29 A Yes. A customer currently on Rate 6L, or one who is currently being supplied by an
30 alternate supplier but had the opportunity to return to 6L before its availability was

1 eliminated, would certainly have to consider how the unavailability of Rate 6L affects
2 its options. If Rate 6L is unavailable to a customer electing to take supplies from an
3 alternate provider, the customer must give considerably more weight to the risks and
4 uncertainties present in the “competitive” market if there is no way back to regulated
5 service, than would be the case if there is. Thus, for some customers, depending
6 upon their risk tolerance, granting of ComEd’s Petition could have just exactly the
7 opposite of the intended effect.

8 **Recommendation**

9 **Q WHAT IS IIEC’S FINAL RECOMMENDATION TO THE COMMISSION IN THIS**
10 **PROCEEDING?**

11 A It is our recommendation that the Commission reject ComEd’s Petition. There is
12 simply a lack of evidence of the existence, now or in the immediate future, of a
13 competitive retail market for the customers whose service is the subject of this
14 proceeding. There are many unknown, and presently unknowable, factors that need
15 to be considered in making a decision to declare a service competitive. Indeed, the
16 outlook for competition in the near-term may be less clear today than at anytime since
17 open access began ... in other words, the worst possible time to blindly assume the
18 market will develop sufficiently to provide comparable service at comparable prices.

19 The current situation in which we find ourselves is much like that of the ocean
20 liner shrouded in fog in the middle of an archipelago, that loses its navigation gear.
21 Maintaining position is a relatively safe course of action and the captain of the ocean
22 liner would be well advised to take that option, rather than to set out in some direction
23 without being able to assess the risks in doing so – knowing only that there were

1 numerous dangers or potential dangers lurking in the fog. In my view, the only
2 prudent course of action at this point in time is to “sit tight” until the fog lifts.

3 **Q DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

4 **A Yes, at this time. I reserve the right to supplement this testimony if additional**
5 information is received.

Qualifications of Maurice Brubaker

1 **Q PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A Maurice Brubaker. My business mailing address is P. O. Box 412000, 1215 Fern
3 Ridge Parkway, Suite 208, St. Louis, Missouri 63141-2000.

4 **Q PLEASE STATE YOUR OCCUPATION.**

5 A I am a consultant in the field of public utility regulation and President of the firm of
6 Brubaker & Associates, Inc., energy, economic and regulatory consultants.

7 **Q PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND EXPERI-**
8 **ENCE.**

9 A I was graduated from the University of Missouri in 1965, with a Bachelor's Degree in
10 Electrical Engineering. Subsequent to graduation I was employed by the Utilities
11 Section of the Engineering and Technology Division of Esso Research and
12 Engineering Corporation of Morristown, New Jersey, a subsidiary of Standard Oil of
13 New Jersey.

14 In the Fall of 1965, I enrolled in the Graduate School of Business at
15 Washington University in St. Louis, Missouri. I was graduated in June of 1967 with
16 the Degree of Master of Business Administration. My major field was finance.

17 From March of 1966 until March of 1970, I was employed by Emerson Electric
18 Company in St. Louis. During this time I pursued the Degree of Master of Science in
19 Engineering at Washington University, which I received in June, 1970.

20 In March of 1970, I joined the firm of Drazen Associates, Inc., of St. Louis,
21 Missouri. Since that time I have been engaged in the preparation of numerous

1 studies relating to electric, gas, telephone and water utilities. These studies have
2 included analyses of the cost to serve various types of customers, the design of rates
3 for utility services, cost forecasts, cogeneration rates and determinations of rate base
4 and operating income. I have also addressed utility resource planning principles and
5 plans, reviewed capacity additions to determine whether or not they were used and
6 useful, addressed demand-side management issues independently and as part of
7 least cost planning, and have reviewed utility determinations of the need for capacity
8 additions and/or purchased power to determine the consistency of such plans with
9 least cost planning principles and the prudence of the actions undertaken.

10 I have testified before the Federal Energy Regulatory Commission (FERC),
11 various courts and legislatures, and the state regulatory commissions of Alabama,
12 Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia,
13 Guam, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Missouri,
14 Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania,
15 Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia,
16 Wisconsin and Wyoming.

17 The firm of Drazen-Brubaker & Associates, Inc. was incorporated in 1972 and
18 assumed the utility rate and economic consulting activities of Drazen Associates, Inc.,
19 founded in 1937. In April, 1995 the firm of Brubaker & Associates, Inc. was formed.
20 It includes most of the former DBA principals and staff. Our staff includes consultants
21 with backgrounds in accounting, engineering, economics, mathematics, computer
22 science and business.

23 During the past ten years, Brubaker & Associates, Inc. and its predecessor
24 firm has participated in over 700 major utility rate and other cases and statewide
25 generic investigations before utility regulatory commissions in 40 states, involving

1 electric, gas, water, and steam rates and other issues. Cases in which the firm has
2 been involved have included more than 80 of the 100 largest electric utilities and over
3 30 gas distribution companies and pipelines.

4 An increasing portion of the firm's activities is concentrated in the areas of
5 competitive procurement. While the firm has always assisted its clients in negotiating
6 contracts for utility services in the regulated environment, increasingly there are
7 opportunities for certain customers to acquire power on a competitive basis from a
8 supplier other than its traditional electric utility. The firm assists clients in identifying
9 and evaluating purchased power options, conducts RFPs and negotiates with
10 suppliers for the acquisition and delivery of supplies. We have prepared option
11 studies and/or conducted RFPs for competitive acquisition of power supply for
12 industrial and other end-use customers in more than a dozen states, involving total
13 needs in excess of 2,500 megawatts.

14 In addition to our main office in St. Louis, the firm also has branch offices in
15 Kerrville, Texas; Plano, Texas; Denver, Colorado; Asheville, NC; and Chicago,
16 Illinois.

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